Supreme Court, U.S.
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80-1128
No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;
SOUTHERN CONFERENCE OF TEAMSTERS;
CENTRAL STATES CONFERENCE OF TEAMSTERS,
Petitioners,
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET. AL.,
Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. May labor unions be held liable, in a suit under 29 U.S.C. § 185, for a breach of the duty of fair representation, where those unions are not the exclusive bargaining representative of the individuals who bring the suit, but appoint the union members of a joint committee which, following its customary and agreed-upon procedures, reaches a permissible decision under the collective bargaining agreement?

2. May labor unions be held jointly and severally liable along with the employer for monetary damages to respondent truck drivers, where the employer proposed and implemented the course of proceedings which allegedly breached the duty of fair representation?

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ARKANSAS-BEST FREIGHT SYSTEM, INC., ET. AL.,
Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

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[1] The following is a list of all parties:

Petitioners: Central States Conference of Teamsters; Southern Conference of Teamsters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Respondents: Keith Alsip; Arkansas-Best Freight Systems, Inc.; Thurman Arman; James Barnhouse; L. B. Barrentine; Sylvester Bechtel, Jr.; Maxie O. Blanton; Joe Brewer; Jack L. Brewington; Tommy R. Burgess; James C. Burkett; Utah H. Caldwell; Harold Carr; Charles Carter; Charles W. Coble; Floyd E. Cockrum; Carl T. Cooper; Douglas W. Daniel; Carroll

Appeals for the Eighth Circuit, entered in this proceeding on August 25, 1980, the writ to issue only in the event that this Court should grant the petition for a writ of certiorari in No. 80-893, at this Term.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 629 F. 2d 538 (8th Cir. 1980), while the order denying rehearing is not yet officially reported. (Pet. App. A54).[2] The opinion of the District Court is reported at 475 F. Supp. 180 (E.D. Ark. 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 25, 1980. Respondents' petition for rehearing was denied on October 6, 1980. This cross-petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

E. Davidson; Charley W. Deaton; Oscar Derrington, Jr.; James R. Dye; Clyde G. Edwards; Gene Ellis; M. R. Garner; G. A. Ghent; Bruce Gray, Jr.; James P. Griffin; Ray D. Halstead; Kenneth J. Hamby; James D. Hammock; Raymond Hawkins; Dale T. Healea, Jr.; Odus Howard; William D. Jefferson; Harold D. Kauffman; Cleo Keeney; James W. Kinsey; Glenn P. Kirkland; Harbert Lemay; John E. Lindquist; Robert H. Marshall; Bobby M. Mason; H. D. Matthews; James H. Mauldin; Lon McDonald, Jr.; William N. McDonald, Jr.; Charles E. Middleton; Aubrey J. Milam; R. C. Moore; William S. Moyer; Larry W. Patterson, Sr.; Deamus Reeves; John H. Richards; Charles R. Robinson; W. D. Rogers; Edison R. Runyan; Jimmy N. Scates; Wilborn E. Shaw; Arvin E. Skidmore; Cleveland Smith; Harold T. Stapleton; James M. Staton; Robert A. Thomason; Henry E. Thompson; Harry D. Wells; Roy C. Wetherington; Ted Wheeler; Ralph E. Williams; Dorris L. Wilson; James Lovell.

[2] References to "Pet. App." are to the Appendix to the Petition in No. 80-893, at this Term.

STATUTE INVOLVED

United States Code, Title 29:

> Section 185(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b). Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

STATEMENT OF THE CASE

I. Nature of the Case

Respondents, truck drivers who were employed by respondent Arkansas-Best Freight System, Inc. ("ABF") and domiciled in Arkansas, are members of Teamster local unions in Little Rock (Local 878) or Fort Smith (Local 373), Arkansas.

Respondents sued ABF and the International Brotherhood of Teamsters ("IBT") and two of its affiliates, the Central Conference of Teamsters ("Central") and the Southern Conference of Teamsters ("Southern"),[3] claiming that their seniority and

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[3] This brief is filed on behalf of the three petitioning labor unions, who shall be referred to collectively hereinafter as petitioners. Further references herein to "respondents" shall refer to only the plaintiff-truck drivers, excluding ABF unless specifically included.

other rights provided in the National Master Freight Agreement ("NMFA") had been violated by ABF's movement of certain freight operations from Arkansas to Northern terminals, principally in Ohio. The claim was that ABF had violated the NMFA, and that IBT, Central and Southern had violated a duty of fair representation. Jurisdiction was predicated upon Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185.

Trial was to the court whose findings and conclusions stated that the change of operations was "not impermissible";[4] that the change of operations committee "has the duty to resolve questions of seniority and domicile fairly and in good faith";[5] and that established rules of procedure were not followed. Judgment was for respondents against ABF, IBT, Central and Southern, which were held jointly and severally liable for specified amounts totalling $258,868.78.

On appeal, the United States Court of Appeals for the Eighth Circuit agreed that the ruling of the change of operations committee was permissible and affirmed the liability aspects of the district court's decision (Pet. App. A44). However, the court vacated the awards of monetary damages but awarded respondents their costs in the court of appeals because respondents "failed to prove damages caused by the errors in connection with the proceedings before the Change of Operations Committee". (*Id.*, A51).

II. The Pertinent Facts

A. The "Change Of Operations" and the Collective Bargaining Agreement

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[4] Pet. App. A15. This curious phrase, coined by the trial court, is no less than a judicial determination that the committee's decision did not breach the contract.

[5] Pet. App. A15.

The NMFA[6] is a nationwide collective bargaining agreement which specifies the wages, hours and working conditions — including seniority rights — which employees of signatory motor carriers must receive. Unions and employees seek to freeze as many conditions as possible for the term of the contract.

Management, on the other hand, insists that the motor freight industry cannot be static; the changing nature of the economy, the varying demands of shippers, the mobility of industry which results in changing patterns of concentrations of customers, and improvements in highways and in equipment all contribute to the necessarily volatile nature of the motor freight industry.

These competing employer vs. employee interests are accommodated in the NMFA by a series of provisions relating, on the one hand, to employees acquiring and maintaining seniority status and job seniority,[7] and, on the other, the employer's absolute right "to designate home domiciles and the operational requirements of the business".[8]

Preservation of both the employee's seniority rights and the employer's right to designate home domiciles and determine operational requirements is the function of a committee established pursuant to Article 8, § 6, which provides:[9]

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[6] Where we refer to "NMFA" unless otherwise indicated throughout the brief, we include the applicable area supplement. The agreement at issue herein covered the period July 1, 1973 to May 31, 1976.

[7] See NMFA, Art. 5, §§ 1-7 (Pl. Ex. 1, pp. 18-27); and Southern Supplement at Art. 42, §§ 1-6 (P. Ex. 1, p. 95 ff); see district court's Finding No. 7 (Pet. App. A3-A6).

[8] NMFA, Art. 8, § 6 (Pet. App. A4-A6).

[9] Note that the parties stipulated that the NMFA is lawful: "there is no issue here as to the validity of these agreements, and the parties agree that these agreements were legally negotiated". Stipulation; Pre-Trial Order p. 11, § 3(c)(iii).

> Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate change of operations committee. Such committee shall be appointed in each of the Conference Areas, equally composed of employer and union representatives. The change of operations committee shall have the authority to determine the seniority of the employees affected and such determination shall be final and binding.
>
> * * *
>
> The Committee shall observe the employer's right to designate home domiciles and the operational requirements of the business.

After reviewing these provisions in detail, the district court held: "the interpretations given to these clauses of the agreements by the change of operations committee were not impermissible ones given the broad authority of the committee". (Pet. App. A15). And the particular change at issue here was, as the district court found, "to the economic advantage of the company".[10] Indeed, the court reiterated its prior statement: "the Change of Operations Committee has broad authority. . . *the decision arrived at was a permissible one.* (Pet. App. A22 (emphasis supplied)).

Nevertheless, the district court determined that certain activities, taken pursuant to normal and customary procedures in change of operations proceedings, justified a finding of breach of the duty of fair representation and the large damage award which the Eighth Circuit vacated.

B. The ABF Change of Operations

In May of 1975, ABF, "faced with mounting problems brought about by change in the flow of freight resulting from

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[10] Accordingly, the court stated, "...it will not be necessary for you to introduce any proof as to...whether or not this was a desirable move on the part of the company". (Trial Transcript, p. 1180).

purchase of additional operating authority, adding new market areas, and stronger competition",[11] decided to "put [its] road operations at the headhaul which requires that the workload at various domiciles be changed".[12] Accordingly, ABF proposed to move drivers from South to North[13] — i.e., where the freight originated — at the "headhaul". Upon union objections at the hearing, the original proposal was withdrawn;[14] as was an amended proposal presented in July.[15] A further amendment resulting in a third proposal was later presented and approved after a hearing held in Chicago in September, 1975.[16] This change, which became effective in November, 1975, reduced employment by 50 in two Southern and two Central terminals, and increased the driving staff by 50 in the North.[17] The contractual seniority rights of all were protected — but movement South to North (while balancing fifty losses vs. fifty gains)[18] adversely affected the work schedules of plaintiffs, and resulted in re-domicile of many of them.[19] As we have already pointed

[11] Defendant's Exhibit 4, p. 217.

[12] *Ibid.*, at 218.

[13] The proposal (see Pet. App. A8) would have resulted in the elimination of seven jobs.

[14] The withdrawal was pursuant to the committee ruling to "refer it back to the parties". (D. Ex. 4, p. 354).

[15] Pet. App. A11.

[16] Pet. App. A11-12; D. Ex. 8 and 9; cf. Tr. 1639 ff.

[17] The specific gains and losses are set forth at Pet. App. A12.

[18] The original ABF proposal eliminated 68 jobs while adding only 61. Pet. App. A8.

[19] Generally, the movement was: 14 Fort Smith drivers were given the option to exercise modified system seniority (Pet. App. A7) and move elsewhere in the South and the ABF system.

The diminished work load in Little Rock meant that lesser seniority drivers there had the option to bid into a "Master Active Pool" from which the gaining terminals were to be staffed, to move elsewhere in the ABF system in the South in accordance with their modified seniority, or to be laid off pending recall in Little Rock when business there warranted.

out, the court below held that this decision "was a permissible one", and within the "broad authority" of the change of operations committee. Pet. App. A22.

C. The Local Unions

Local 878 of Little Rock is the certified exclusive bargaining agent for the Little Rock drivers. Local 373 of Fort Smith is so certified for the Fort Smith drivers. Each local is autonomous, with its policies, practices and officers being selected by vote of the local membership pusuant to the provisions of the Constitution of the IBT with which each local is affiliated. Neither local is a party to the case. Petitioners do not claim that these local unions failed to fairly represent them.[20]

D. Proceedings Before, and Functions of, the Change of Operations Committee

As explicitly stated in the NMFA, the committee has no power to tamper with "the employer's right to designate home domiciles and the operational requirements of the business".[21] Clearly, the contract gives that unilateral decision to the employer.

The committee's only power is "to determine the seniority of the employees affected".[22] Only if a change will deny contractual seniority rights is the committee empowered to disapprove the change — and require amendment to the planned change to effect seniority protection, which is exactly what was done here after three separate committee hearings.

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[20] It was stipulated, Pre-Trial Order, p. 11: "Neither of these local unions has been made a party defendant to this lawsuit. Plaintiffs have no claims and are making no claims of unfair representation, fraud, collusion, conspiracy, or arbitrary actions against either of these local unions in regard to the matters complained of in their complaint".

[21] NMFA, Art. 8, § 6, Pet. App. A5.

[22] NMFA, Art. 8, § 6, Pet. App. A4.

The court of appeals agreed "in general"[23] with the district court's findings of breach of the duty of fair representation based upon the following factors: the committee was improperly constituted (Finding 30a., Pet. App. A15); an employer member of the committee was not qualified to sit on the committee due to certain stock ownership (Finding 30b., Pet. App. A15); an accurate and complete record of the proceedings was not kept (Finding 30c., Pet. App. A15); *ex parte* pre-hearing contacts occured (Findings 31a and 31b., Pet. App. A16); and the union representatives on the committee failed to fairly represent respondents at the hearing (Finding 32, Pet. App. A16). Each of those findings imposes upon the parties standards which they have never agreed to but which, in the mind of the district court, were required.

Thus, the district court's interpretation of the equality of representation between conferences issue was rejected by Ray Beagle, an attorney in this case and one of the draftsmen of the rules, W. C. Smith, Roy Lane and R. V. Pulliam. Tr. 500, 1323 ff. Indeed, this entire issue was raised by the court (Tr. 473, 498-500) and was not even a part of plaintiffs' complaint.

As to stockholdings of M. B. Harp, it is clear that the parties to the contract have never considered stock ownership in determining the composition of any committee. Nevertheless, although Mr. Harp is employed by a competitor of ABF and holds .0004043 percent equity in ABC Company, a holding company of ABF, the district court found his participation in the proceedings to be grounds for liability.

As to the transcripts, the parties had stipulated the accuracy of those transcripts and only one witness, Mr. Kirkland, testified that the transcripts were inaccurate. Every other witness attested to the accuracy of the transcripts.[24]

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[23] Pet. App. A42.

[24] See witness Little at Tr. 1246-1247; Lane at 1785 ff; Smith at 1646; Graves at 570-571; and, Pickering at 209-210, 215.

Finally, the district court found a violation of the duty of fair representation based upon pre-hearing contacts between employer representatives and members of the committee, even though the record is clear that an employer who intends to change operations must discuss his intentions openly.[25] Indeed, a refusal to enter into such discussions would violate the contract which requires 20 days written notice to the affected local unions of any potential change of operations.

Further, the rationale by which the successive proposals were considered and the final proposal approved is fully and precisely recorded in Smith's testimony. See Tr. 1594-1616, 1640-1653. There is no claim that the committee's decision deprived any person affected by the movement of freight to the north of any seniority selection rights. Rather, the district court faulted the committee for not equalizing the hardship of the move by requiring ABF to move fewer drivers out of Arkansas.[26] But the contract leaves domicile to unilateral employer decision and the decision of this committee was entirely consistent with committee precedent.[27] Thus, the committee had no authority to prevent the employer from changing domiciles and reducing the contingent of drivers at Fort Smith in Little Rock. Under any conceivable decision, some drivers would have been required to re-domicile, an inevitability which the committee was powerless to prevent. Once the committee determined that the change of operations did not infringe upon seniority protections, its functions ended.

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[25] Tr. 340-341, 1304, 1306, 1336-1337, 1354, 1394, 1440-1441.

[26] One basic fallacy in the district court's approach is the notion that somehow when the move is from South to North that there can be some equality of adverse impact on locals in the South and North. This just is not so. By definition, necessarily when the move is from South to North, the northern local would gain and the southern local would lose. Conversely, when industry moves South, the North loses and the South gains.

[27] See Tr. 1550 ff, 1616 ff.

REASONS FOR GRANTING THE WRIT

The errors of which we complain are of little practical effect or interest in the present posture of this particular case, inasmuch as the court of appeals has vacated the damage award against these petitioners. However, our adversaries seek certiorari in Case No. 893, and thereby seek reinstatement of the large damage award.

Only if certiorari is granted in No. 893 do we urge the granting of certiorari here. Should the damage award be reviewed, the following are reasons for granting the writ:

This case involves the validity of practices under the National Master Freight Agreement, a nationwide multiemployer collective bargaining agreement, pursuant to which the nation's motor freight carriers, and the unions which represent their drivers, provide the means for the carriers to change their operations and improve their service to the public while protecting the seniority and other rights guaranteed to the truck drivers by the agreement.

The district court imposed a quarter of a million dollar judgment against defendant motor carrier and defendant unions for implementing a "change of operations" whereby the carrier improved its service to the public, and its profit, by enlarging its driver complement in Dayton, Cincinnati, and Indianapolis, while diminishing the number of drivers employed in Arkansas and Missouri. Although the decision was "not impermissible" under the collective bargaining agreement, the court objected to the procedures employed by the change of operations committee. The court of appeals simply affirmed "in general" the findings of the district court.

The decisions below empower the committee to block a change of operations in which seniority rights are fully protected. Apparently the theory is that, in the lower court's view, the committee should have the power to second guess the

employer's decision as to domicile of drivers and the operational requirements of the business. Frankly, the unions would like that — but it is not our bargain. We agreed that the employer should have, "...the right to designate home domiciles and the operational requirements of the business". NMFA Art. 8, § 6, Pet. App. A5. As long as the employer's change proposal does not adversely affect seniority rights, neither the committee nor the court has the right to require some other change which would better fit its notion of what is "fair".

Despite the clear contract language that domicile was at the employer's sole discretion, the courts below insist that the committee "has the duty to resolve questions of seniority *and domicile*". (Pet. App. A15, emphasis added.) Thus, although the court agreed that the decision of the change of operations committee was a permissible decision, and in our view a decision without an alternative, the court found liability under Section 301 absent any finding of a breach of the underlying collective bargaining agreement by the committee's decision. That resolution conflicts with the Supreme Court's decision in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The court also erred by holding that the petitioners herein owed any duty of fair representation to plaintiffs in the circumstance in which they are not the exclusive bargaining representative for the plaintiffs. That holding conflicts with holdings of several coordinate courts of appeal. E.g., *Teamsters Local 30* v. *Helms Express, Inc.*, 591 F. 2d 211 (3d Cir.), *cert. denied* 444 U.S. 837 (1979); *Walters* v. *Roadway Express, Inc.*, 400 F. Supp. 6 (S.D. Miss. 1975), *aff'd.* 557 F. 2d 521 (5th Cir. 1977).

Third, the courts below have effectively rewritten the collective bargaining agreement with respect to "changes of operations" and in so doing have imposed requirements to which the parties never agreed and some of which, if required generally, would make unworkable the change of operations procedure which the parties have utilized so effectively for many years.

For example: the parties have required, and have excellent reason for requiring, that such committees be composed of experts in the motor carrier industry. To disqualify (as the courts below do) any who hold even a miniscule equity in another motor carrier, will necessarily result in the substitution of persons having no practical experience in the industry.

Similarly, the general requirement that there be no prehearing discussion of the change proposals will make the entire procedure wholly unworkable. The committee is not a judicial tribunal. It is a committee of motor freight experts who necessarily must arrive at conclusions based on knowledge of the industry, the collective agreement, and the reasons for and the practical effect of a particular change. If that information must be acquired by formal pleadings and the formal due process required of the judiciary, if committee members are to be barred from making decisions as they always do in their business life, by everyday contact with others in the industry, then the whole idea of prompt decision by those knowledgeable of the industry and its practices is aborted.

If the parties had thought it practicable to litigate at the courthouse with the trappings of *judicial* due process before changes of operations necessary to the life of the industry, and proper service to the public, they could have so provided in their agreement. They did not. The court should not impose upon the parties conditions which the parties refused to adopt.

At bottom, the courts below insist on imposing conditions which they conceive as "fair" — but ignore the fact that the contracting parties did not do so. It is only the procedure "agreed upon by the parties" which the court may properly require. NLRA § 203(d); 29 U.S.C. § 173(d).

Fourth, the Eighth Circuit's opinion imposes liability upon the labor unions herein for actions taken by appointed joint committee members who are functioning as arbitrators and imposes upon those arbitrators a duty to fairly represent individual

employees, which conflicts with their actual functions. By requiring those joint committee members to advocate the stand of any particular group of employees, and by imposing liability for their failure to do so upon the labor unions which appointed them, the Eighth Circuit has imposed functions upon those members which are in direct conflict with their functions.

Finally, the court's decision erred in that it imposed upon the unions damages attributable solely to the employer. The court's imposition of joint and several liability conflicts directly with this Court's decisions in *Czosek* v. *O'Mara,* 397 U.S. 25 (1970) and *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

ARGUMENT

I. The Imposition Of Liability In The Absence Of A Breach Of The Underlying Collective Bargaining Agreement And In The Context Of A Permissible Decision By The Committee Violates Settled Law Under Section 301.

Since plaintiffs' case was based upon 29 U.S.C. §185, but the district court and the court of appeals both specifically found that the decision of the change of operations committee was a permissible one under the NMFA, there can be no liability against any defendant.

In *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), this Court faced the issue of whether or not a suit against an employer could proceed where the employer was dismissed via summary judgment while the union's motion was denied. The Court stated that:

> "To prevail against either the company or the union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union". 424 U.S. at 570-571.

Thus, where no violation of the contract has occurred the entire case must be dismissed. See *Vaca* v. *Sipes*, 386 U.S. 171, 187 (1967); *Buchholtz* v. *Swift and Co.*, ____ F. 2d ____, 101 LRRM 2229 (8th Cir. 1979); *Palnau* v. *Detroit Edison Co.*, 301 F. 2d 702, 704 (6th Cir. 1962); *Adams* v. *Budd Co.*, 349 F. 2d 368 (3d Cir. 1965); *Mumford* v. *Glover*, 503 F. 2d 878, 882 (5th Cir. 1974); *Lewkiw* v. *IBEW, Local 1470*, 464 F. 2d 721 (3d Cir.), *cert. denied* 409 U.S. 104 (1972); *Gonzalez* v. *Longshoremen, Local 1581*, 498 F. 2d 330 (5th Cir.), *cert. denied* 419 U.S. 1070 (1974); *Gratien* v. *Bethlehem Steel Corp.*, ____ F. Supp. ____, 68 LC ¶ 12,628 (W.D. N.Y. 1972).

II. The Court Of Appeals' Decision Imposing A Duty Of Fair Representation Upon The Labor Organizations Involved Herein Conflicts With Decisional Authority From Other Circuits.

It is axiomatic that the duty of fair representation is owed only by the employees' exclusive bargaining representative, in this case Locals 373 and 878. Thus, the higher union bodies at issue herein, which are concededly *not* the exclusive bargaining representative, owe no such duty to respondents because the duty does not flow to larger union bodies with which the exclusive representative is affiliated. Federal courts, including the Third and Fifth Circuits, have repeatedly held that only the local unions have representational duties under the NMFA and that higher union bodies such as IBT, Central and Southern owe no duty of fair representation to local union members with respect to that contract. See *Teamsters Local 30* v. *Helms Express, Inc.*, 591 F. 2d 211, 217 (3d Cir.), *cert. denied* 444 U.S. 837 (1979); *Walters* v. *Roadway Express, Inc.*, 400 F. Supp. 6, 16 (S.D. Miss. 1975), *aff'd.* 557 F. 2d 521 (5th Cir. 1977); *Encina* v. *Tony Lama Co.*, 316 F. Supp. 239, 245 (W.D. Tex. 1970), *aff'd.* 448 F. 2d 1264 (5th Cir. 1971); *Berry* v. *Pacific Intermountain Express Co.*, ____ F. Supp. ____, 85 LRRM 2408, 2410 (D. N.M. 1974); *Brooks* v. *Southwestern Transportation Co.*, ____ F. Supp. ____, 97 LRRM 2616 (N.D. Tex. 1978); *Hughes* v. *Beverage Distributing Co.*, ____ F. Supp. ____, 85 LRRM 2071 (C.D. Cal. 1973); *Difini* v. *Spector Freight Systems, Inc.*, ____ F. Supp. ____, 101 LRRM 3055 (E.D. N.Y. 1979); *Warren* v. *IBT*, ____ F. Supp. ____, 90 LRRM 2241, 2247 (E.D. Mo. 1975) *aff'd.* 544 F. 2d 334 (8th Cir. 1976).

In short, the decision of the Eighth Circuit in this case imposing a duty of fair representation upon these original union bodies is directly at odds with numerous other federal court decisions.

III. The Eighth Circuit's Imposition Of Procedural And Substantive Standards Upon The Joint Committee, Which Standards Have Not Been Agreed Upon By The Parties, Conflicts With Decisions Of Other Courts And With The National Labor Policy.

The Congress has enacted a labor policy ignored by the court of appeals in this case. That policy is expressly stated in Section 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d):

> "Final adjustment by a *method agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ." (Emphasis added.)

For, as held in *United Mine Workers* v. *Barnes and Tucker Co.*, 561 F. 2d 1093, 1096 (3d Cir. 1977):

> "It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration."

See *Teamsters Local 30* v. *Helms Express, Inc.*, 591 F. 2d 211, 218 (3d Cir.), *cert. denied* 444 U.S. 837 (1979).

Thus, since the decision here imposes standards not provided in the contract and methods not agreed upon by the parties to solve their disputes, it is inconsistent with the national labor policy and prior decisions.

IV. The Decision Of The Court Of Appeals Conflicts With Decisional Authority From Other Circuits In That It Requires Union Representatives Who Function As Arbitrators To Advocate The Stand Of A Particular Group Of Employees And Removes The Cloak Of Arbitral Immunity From Them.

The court of appeals imposed on the members of the change of operations committee the legal standards required of an exclusive bargaining agent, i.e., the duty to fairly *represent*. In fact, neither the committee nor those who constitute it are employee representatives. Rather, they make up the *tribunal* which has the responsibility to determine the adversary claims as to seniority rights of the employees and the respective local unions and those drivers represented by those unions.

The duties of fair representation are not the function of this committee and the court of appeals erred in requiring the committee to advocate the stand of the plaintiffs.

Unless the law is to take a new turn, no liability may attach to the committee or the institutions which designated its members as a result of its determinations. See *Difini* v. *Spector Freight Systems, Inc.*, ____ F. Supp. ____, 101 LRRM 355 (E.D. N.Y. 1979); *Shropshire* v. *Teamsters Local 957*, ____ F. Supp. ____, 102 LRRM 2751 (S.D. Ohio 1979); *DeVries* v. *Interstate Motor Freight System*, ____ F. Supp. ____, 91 LRRM 2764 (N.D. Ohio 1976); *Cahn* v. *International Ladies Garment Workers Union*, 203 F. Supp. 191 (E.D. Penn.), *aff'd.* 311 F. 2d 113 (3d Cir. 1962); *Hill* v. *Aro Corp.*, 263 F. Supp. 324 (M.D. Ohio 1967); *Rubenstein* v. *Otterbourg*, 357 N.Y.S. 2d 62 (1973).

In sum, the courts below erred by imposing upon the arbitrators the duty to fairly represent employees and by imposing liability for their actions upon the labor unions which appointed them to the committees.

V. The Imposition Of Joint And Several Liability Upon The Unions And The Employer Conflicts With Settled Decisional Authority From This Court.

The district court imposed joint and several liability upon the unions and the employers. The court of appeals overturned the awards of damages but made no mention of the issue of joint and several liability. If this Court grants the petition for certiorari in case No. 80-893, then the Court should review the apportionment of damages since the imposition of joint and several liability by the district court constitutes reversible error.

This Court has made it clear beyond cavil that labor unions may not be charged for damages which are in any way attributable to the employer. "Damages attributable solely to the employer's breach of contract should not be charged to the union". *Vaca* v. *Sipes,* 386 U.S. 171, 197 (1967). Thus, the labor defendants herein cannot "be forced to pay damages for which the employer is wholly or partly responsible". *Czosek* v. *O'Mara,* 397 U.S. 25, 28-29 (1970).

Here, where ABF initiated the entire underlying sequence of events, made the presentation to the committee, implemented the change, and engaged in pre-hearing contacts, ABF alone should be held responsible for all of the damages, if such should be found to exist.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that if this Court grants the petition for a writ of certiorari in No. 893, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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